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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DGP ASSOCIATES, L.P., Plaintiff and Appellant, v. AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY et al., Defendants and Respondents.	A145034 (San Francisco City & County Super. Ct. No. CGC-12-525632)

I.

INTRODUCTION

This case arises out of a dispute regarding insurance benefits for fire damage to a meat processing facility on Cabot Road in South San Francisco (Cabot or the Cabot property). The damage was covered under a "Zurich Edge" insurance policy issued by American Guarantee and Liability Insurance Company (American Guarantee) to the tenant of the Cabot property, Columbus Manufacturing, Inc., and its parent company, Columbus Foods, LLC (collectively referred to in the singular as Columbus).[1]

DGP Associates, L.P. (DGP), the owner of the Cabot property, filed the instant action against American Guarantee and its parent company Zurich American Insurance Company (Zurich), claiming that American Guarantee committed a bad faith breach of

[1] To properly consider the issues on appeal, we occasionally distinguish between these entities by referring to the parent as Columbus Foods and its subsidiary as Columbus Manufacturing.

contract by refusing to pay DGP's insurance claim for the full replacement value of the Cabot property. After the trial court granted American Guarantee's motion for summary judgment, judgment was entered in favor of American Guarantee and Zurich.[2]

On appeal, DGP contends that, as a matter of law, American Guarantee breached a contractual obligation to DGP by paying Columbus insurance benefits for the replacement value of interior "tenant" improvements at the Cabot property. DGP also contends there are triable issues of material fact with respect to its unpaid claims for demolition costs and professional fees. We affirm the judgment.

II.

STATEMENT OF FACTS

A. Background

The San Francisco Sausage Company, Inc. operated a specialty meat business under the brand name Columbus Salame. San Francisco Sausage was owned by the fathers of the partners of DGP, which was established in the 1970's or 1980's for the purpose of acquiring real estate that was then leased to San Francisco Sausage or one of its related corporations. At some time during the 1980's, DGP also became the owner of the San Francisco Sausage Company.

In 1999, DGP purchased the Cabot property and leased it to San Francisco Sausage for use as a meat processing facility.

In 2006, DGP sold San Francisco Sausage to Endeavor Capital. Endeavor reorganized San Francisco Sausage into three related companies; Columbus Foods became the parent/holding company for two wholly owned subsidiaries, Columbus Manufacturing and Columbus Distributing.[3] DGP then leased the Cabot property to Columbus Manufacturing.

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[2] In the lower court and on appeal, DGP often refers to American Guarantee as Zurich. Although we do not agree with this nomenclature, it sometimes appears in this opinion.

[3] DGP's partners retained an ownership interest in Columbus, the nature of which DGP refused to disclose during this litigation.

The April 2006 lease agreement between Columbus Manufacturing and DGP described the leased premises as "[a]pproximately 35,000 gross rentable square feet of industrial space." Under the terms of the lease, DGP was responsible for maintenance and repairs of the structure, exterior walls, foundations and roofs of the building, and Columbus was responsible for maintaining and repairing every other part of the premises, including plumbing, heating, electric and lighting, fixtures, ceilings and flooring.

The Cabot lease obligated Columbus Manufacturing to obtain general liability insurance and all-risk property insurance covering loss or damage of the premises. With respect to property insurance, the lease authorized Columbus to obtain a policy covering both the premises and the personal property of Columbus upon terms and conditions mutually agreeable to the parties.

B. The American Guarantee Insurance Policy

In January 2009, Columbus purchased Zurich Edge Policy No ERP-937816605 (the policy). The first page of the policy, which covered a one-year period, identified Columbus Foods and all of its subsidiaries as the "Insured," and American Guarantee as the "Company."

Section I, Part A of the policy stated: "COVERAGE [¶] The Company will pay for direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property, at an Insured Location described in the Declarations. All subject to the terms, conditions and exclusions stated in this Policy." The Cabot property, one of four "Insured Location[s]" listed in the policy, was insured for up to $50 million.

Section III of the policy, which described "Covered Property," provided in pertinent part: "This Policy insures the following property, unless otherwise excluded elsewhere in the Policy, located at an Insured Location or within 1,000 feet thereof or as otherwise provided for in this Policy: [¶] 1. The Insured's interest in buildings (or structures) including new construction, alterations, additions, and repairs; that the Insured owns, occupies, leases or rents. [¶] 2. The Insured's interest in personal property including **Improvements and Betterments.** [¶] . . ." (Original boldface.)

Section VI of the policy, the "GENERAL POLICY CONDITIONS," included the following provision: "LOSS ADJUSTMENT/PAYABLE [¶] Loss, if any, will be adjusted with and payable to the **First Named Insured** as shown on this Policy, or as directed by the **First Named Insured**. Additional insured interests will also be included in loss payment as their interests may appear when named as lender, mortgagee and/or loss payee in the Certificates of Insurance on file with the Company." (Original capitalization & boldface.)

Section VII of the policy, the "DEFINITIONS" section, defined the term "First Named Insured" as the "First Insured listed under Named Insured."

The cover page of the policy identified Columbus Foods and its subsidiaries as the Named Insured. A "Named Insured Endorsement" incorporated into the policy set forth a list of 20 Named Insured entities. Columbus Foods was the first insured on the list, followed by Columbus Manufacturing, and several additional entities many of which used some version of the Columbus name. DGP was the 18th "Named Insured" listed on the endorsement.

C. The 2009 Fire and Building Loss Claims

On July 23, 2009, a fire substantially destroyed the Cabot property. American Guarantee assigned adjuster Jack Healy to handle claims filed against the policy and retained several consultants to assist Healy, including Burton Brothers Construction and Safford King Wiese Engineering who helped evaluate the building loss.

Columbus Foods' chief financial officer Adam Ferrif was responsible for submitting insurance claims on behalf of Columbus. Ferrif determined that there were two distinct components of covered building loss, "the shell of the building and the leasehold improvements in the building." Ferrif understood that DGP owned the building structure, but that Columbus owned the leasehold improvements, which were listed as assets of Columbus Manufacturing in company financial records.

Soon after the fire occurred, Columbus and DGP agreed to work together to present their insurance claims to American Guarantee. They jointly hired Dempsey Partners to help them prepare and submit their insurance claims. On Dempsey's

recommendation, Columbus retained Stellar Group Construction Company to generate a repair estimate which was to include replacing the leasehold improvements to the Cabot building. Specifically, Stellar was asked "to establish what it would take in current day's dollars to rebuild the facility back to what it was, a meat slicing facility."

Meanwhile, on August 18, 2009, Adam Ferrif sent Jack Healy an e-mail containing three requests. First, Ferrif requested that American Guarantee make an advance payment under the policy to Columbus in the amount of $1.5 million. Second, "[o]n behalf of DGP," Ferrif requested that American Guarantee make a $1 million advance payment to DGP. Finally, Ferrif requested that American Guarantee separately evaluate losses claimed by these two entities, explaining: "We would like a separate proof of loss for each entity. One for Columbus Manufacturing Inc and one for DGP Associates. We are tracking the costs and losses separately for each entity and ask that the loss be evaluated separately for Columbus Manufacturing Inc and DGP Associates."

Columbus and DGP submitted separate "Sworn Statement[s] in Proof of Loss" to American Guarantee. Both companies claimed an insured interest in the "structure plus improvements, betterments and the time element," and sought payment for losses in an amount to be determined. Both proof of loss forms incorporated the insured's respective requests for advance payments as previously outlined in Ferrif's e-mail to Healy, and both forms were executed on August 20, 2009, before the same notary public.

On August 21, 2009, American Guarantee issued claim checks to Columbus and DGP for the requested advance payments.

On December 1, 2009, Columbus terminated its lease of the Cabot property and DGP filed a claim against the policy for business interruption/loss rents. On December 15, Columbus attorney Phillip Pillsbury, Jr. sent a letter to American Guarantee attorney Johnathan Gross following up on a recent meeting. Pillsbury stated that Columbus was requesting that Zurich continue to adjust separately and pay claims for losses suffered by Columbus and DGP, and advised that "[b]enefits to Columbus Foods should include the cost to replace its improvements and betterments and equipment

destroyed in the Cabot Road fire . . . ." Pillsbury also enclosed a copy of Columbus's lease of the Cabot property, which American Guarantee had requested.

D. American Guarantee's Adjustment of the Property Damage Claims

On March 2, 2010, representatives from American Guarantee, Burton Brothers, Columbus and Stellar Group had a meeting to discuss the Cabot fire damage. Shortly after that meeting, Stellar submitted a cost estimate to rebuild "Columbus Salame" at the existing location. In the first section of its estimate, Stellar calculated that the total cost of the rebuild was $15,453,169.61. Stellar then broke this total into two parts, one for Columbus and the other for DGP. For Columbus, Stellar estimated the cost to repair fire damage to "Interior Improvements" was $11,954,511.29. For DGP, Stellar estimated that the cost of repairing fire damage to the "Shell Building" was $3,498,658.32.

Columbus notified American Guarantee that it agreed with the Stellar estimate and with the cost allocation Stellar made between interior tenant improvements and the building shell. Healy consulted with Burton Brothers, who recommended that American Guarantee accept the Stellar estimate. During the discovery phase of this litigation, a Burton representative testified that Burton recommended accepting Stellar's estimate because Stellar was an upstanding contractor and "we were working as a team to try to get these people back in business."

On March 4, 2010, DGP executed a new "Sworn Statement in Proof of Loss," claiming its covered losses for the Cabot building totaled $22,017,736 (the 2010 claim). Documentation attached to this 2010 claim showed that DGP was demanding payment for both the cost to replace the building shell *and* the cost to replace the interior improvements that Stellar had allocated to Columbus.

In a March 23, 2010 letter, Healy notified DGP attorney Joel Gumbiner that American Guarantee was denying DGP's 2010 claim to the extent it included the replacement value of the interior tenant improvements. Healy explained that American Guarantee was in the process of adjusting a claim from the "First Named Insured" for the tenant improvements loss and that DGP's 2010 claim appeared to include the same loss. On this point, Healy wrote: "From this, American Guarantee concludes that: (1) both

Columbus Foods and DGP are making a claim for the entirety of damage to the tenant improvements; and (2) both Columbus Foods and DGP are relying on the Stellar estimate in support of their respective claims. If this is incorrect, please advise us as soon as possible."

In his March 23 letter, Healy stated that to the extent DGP was claiming some interest in the value of fixtures, equipment or alterations at the Cabot property that were damaged by the fire, Columbus was already claiming the "full value" of those improvements and, under Section VI of the policy, any loss was to be adjusted with and paid to the First Named Insured. Accordingly, Healy stated, American Guarantee "is going to pay the full value of the tenant improvements to Columbus." However, Healy expressly acknowledged that DGP was covered under the policy for "damage to the building (exclusive of tenant improvements) and loss of rents."

In a March 26, 2010 letter, DGP attorney Gumbiner confirmed receipt of Healy's March 23 letter and followed up on a telephone conversation they had the previous day. Gumbiner wrote that DGP disagreed with American Guarantee's coverage analysis, "particularly the decision to deny the claim for replacement cost of the building interior." Gumbiner stated that DGP would await a final determination about how much American Guarantee was willing to pay on the 2010 claim before deciding how to proceed, but urged American Guarantee to reconsider its decision. Gumbiner also acknowledged that Healy had requested a meeting between American Guarantee and DGP. Gumbiner questioned the value of a meeting, but agreed to discuss the matter with his client if Healy wanted to propose an "agenda."

In an April 5, 2010 letter, Healy attempted to correct Gumbiner's misconception that American Guarantee was denying a claim for the replacement cost of the building interior, explaining that American Guarantee had accepted that claim, but was paying Columbus for the damages to tenant improvements pursuant to the terms of the policy. Thus, Healy explained "American Guarantee is declining to make a double payment for the replacement cost of the tenant improvements, i.e., a full payment to Columbus Foods and a full payment to DGP." Healy also reiterated that American Guarantee remained

willing to meet with DGP to discuss any issues pertaining to the adjustment process including "the allocation of costs between the tenant improvements and the rest of the building."

On April 6, 2010, Gumbiner sent another letter to Healy disputing American Guarantee's coverage decision. Gumbiner told Healy not to discuss DGP's claim with Columbus or with anyone other than Gumbiner. Gumbiner also stated that because DGP owned the entire Cabot building, not just the exterior, the policy required American Guarantee to pay DGP the full replacement cost of the building. In closing, Gumbiner stated that "[w]e are entitled, and look forward, to your letter setting out Zurich's position on this claim."

On April 13, 2010, Healy responded to Gumbiner in a four-page letter. Healy highlighted the pertinent policy provisions and outlined American Guarantee's position regarding DGP's potential interests under the policy, which included three categories of loss: (1) lost rents; (2) building damage exclusive of tenant improvements; and (3) tenant improvements. American Guarantee agreed to communicate only with DGP concerning the first two categories, but Healy explained that the policy and instructions from the First Named Insured required American Guarantee to "communicate and adjust the tenant improvements claim with Columbus Foods." Healy also addressed the fact that Gumbiner's letter "seem[ed] to state that DGP owned the tenant improvements at the time of the fire." Healy stated that the Columbus claim for payment of the tenant improvement loss appeared to be supported by its lease of the Cabot property and he requested that DGP provide American Guarantee with any "information showing that the tenant improvements were wholly owned by DGP on the date of the fire."

In his April 13 letter, Healy also stated that American Guarantee's understanding was that "both Columbus Foods and DGP were relying on the [Stellar] cost estimate." He requested that DGP advise American Guarantee if it did not agree with Stellar and that DGP provide any information indicating how the estimate should be changed. After discussing DGP's other categories of loss, Healy reiterated that American Guarantee was available to meet with DGP, stating: "The most efficient way to finalize the claim

adjustment on DGP's claims is if American Guarantee and its consultants can meet with DGP and its consultants to discuss any issues which DGP may have and any information which DGP would like American Guarantee to consider."

E. The Agreement to Share Insurance Benefits

On May 18, 2010, DGP attorney Gumbiner sent an e-mail to Columbus attorney Philip Pillsbury requesting a meeting between DGP and Columbus. Gumbiner stated that he did not want DGP to have to start acting unilaterally with Zurich in a way that compromised Columbus's claim, but he needed to protect DGP's rights and, he stated, the sooner the parties reached an agreement about how to proceed the "better we can protect all of our clients' rights to full recovery under the policy."

In his e-mail, Gumbiner complained to Pillsbury that he was in the position of having to hold back from "explaining to Zurich exactly what DGP owns, what DGP acquired at the termination of the SF Sausage Co. lease in 2006, and what the building leased to Columbus in 2006 consisted of at the commencement of the lease." Gumbiner wanted a meeting between the clients and their counsel so the matter could be resolved as soon as possible.

In June 2010, DGP and Columbus executed a written agreement regarding the allocation of insurance benefits for the Cabot building loss (the June 2010 Side Agreement). Both parties agreed not to take any action that would harm the interest of the other, to work together, and to share information about their respective claims. DGP further agreed to "coordinate its claims presentation with Columbus" and to share any proposed "submission" to the insurance company with Adam Ferrif. If there was any "perceived issue" with regard to a proposed DGP submission, DGP agreed to meet and confer with Columbus and "come to a consensus regarding the content of DGP's submission."

In consideration for DGP's agreement to coordinate its claims presentation with Columbus and to reach consensus with Columbus about the content of those claims, Columbus agreed that if it was able to recover $11.9 million on its building claim for "leasehold improvements," it would pay DGP $2.5 million. This payment would be

made in addition to the $3.5 million insurance payment that the parties expected DGP to recover on its building claim. However, the parties agreed that Columbus's additional payment to DGP would be reduced by any amount DGP received on its building claim in excess of $3.5 million. In addition, Columbus agreed to reinvest its insurance proceeds in another facility owned by DGP.

F. Payment of Policy Limit for Covered Losses at Cabot Property

On June 3, 2010, Columbus executed a new "Sworn Statement in Proof of Loss" in the total amount of $12,002,742, which included $11,954,511 for the loss of tenant improvements to the Cabot property. Adam Ferrif used Columbus's financial records, including Columbus Manufacturing's balance sheet, as a "reconciliation" device to ensure that all of the tenant improvements embraced in the claim were also assets of the company. On June 7, 2010, American Guarantee paid Columbus $12,002,742.

American Guarantee paid DGP a total of $3,498,658 on its claim for building damage to the Cabot property. In January 2011, DGP submitted a request for payment of additional expenses related to the Cabot fire. Burton Brothers evaluated those requests and made recommendations to American Guarantee. Pursuant to those recommendations, American Guarantee agreed to pay some additional expenses but declined to pay others.

On June 7, 2011, Columbus executed a "Policyholder's Release of Claims" form in which it acknowledged, among other things, that American Guarantee had already made payments totaling $36,083,821 for losses resulting from the Cabot fire and that a final payment of $13,916,179 would constitute full satisfaction of Columbus's claim against the policy and would also exhaust the $50 million policy limit for covered loss at the Cabot property.[4]

[4] The multiple payments that American Guarantee made for various components of the covered loss resulting from the Cabot fire were documented in a "Statement of Loss" that was generated in connection with the release that Columbus signed in June 2011. The building loss claims were only one component of the overall loss.

G. Procedural History

In October 2012, DGP sued American Guarantee for breach of contract and breach of the duty of good faith and fair dealing. DGP alleged that American Guarantee breached the policy by refusing to pay DGP $15,453,169, the stipulated replacement value of the Cabot property. DGP further alleged that American Guarantee breached its duties to DGP by engaging in delay, conducting an improper investigation and adopting an unreasonable interpretation of the policy, all for its own economic benefit. Zurich was also a named defendant in these two causes of action. However, in November 2012, DGP dismissed Zurich from the case without prejudice.

In December 2014, American Guarantee filed a motion for summary judgment or summary adjudication, and DGP filed a cross-motion for summary adjudication, seeking a judicial determination that American Guarantee had a contractual duty to pay the balance of DGP's claim for building damage to the Cabot property. On March 18, 2015, the trial court granted American Guarantee summary judgment and denied DGP's motion for summary adjudication as moot.

Before the trial court issued its summary judgment rulings, DGP filed a first amended complaint in which it renamed Zurich as a defendant in the case. After American Guarantee's motion for summary judgment was granted, Zurich filed a motion for judgment on the pleadings on the basis of collateral estoppel, which the trial court granted. Judgment in favor of American Guarantee and Zurich was filed on April 17, 2015.

III.

DISCUSSION

A. Standard of Review

"We review a summary judgment ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. [Citation.] 'In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's

determination of a motion for summary judgment.' [Citation.]" (*Bjork v. State Farm Fire & Casualty Co*. (2007) 157 Cal.App.4th 1, 5-6.)

" 'A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.]' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720.) "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

B. American Guarantee Carried Its Burden on Summary Judgment

As noted, DGP's complaint alleged that American Guarantee breached the policy by failing to pay DGP the total replacement value of the Cabot building. In alleging facts in support of this cause of action, DGP did not acknowledge that American Guarantee paid Columbus's claim for the interior improvements loss. In fact, the complaint did not even mention Columbus. Thus, the breach of contract alleged in the complaint was not that American Guarantee paid insurance benefits to the wrong insured, but rather that it failed to pay insurance benefits for a covered property loss.

American Guarantee carried its summary judgment burden with respect to the contract claim alleged in the complaint by producing evidence of the following facts: The parties stipulated that the total replacement cost was $15,453,169.61; American Guarantee paid Columbus, the First Named Insured under the policy, $11,954,511.29 for covered damage to interior tenant improvements; American Guarantee paid DGP, another named insured, $3,498,658.32 for covered damage to the building structure or shell.

These facts demonstrate that American Guarantee made payments to insureds under the policy which covered the total replacement cost of the Cabot building. Settled law establishes that "the nature of insurance does not provide for recovery in excess of

the value of the property destroyed where there is but one loss." (*Burns v. California FAIR Plan Assn*. (2007) 152 Cal.App.4th 646, 653.) The fact that Columbus and DGP had separately insurable interests in the Cabot property does not mean that each also had a right to recover the total value of the destroyed property. (*Ibid*.)

DGP contends that evidence American Guarantee paid another insured for part of the building loss does not establish that American Guarantee discharged its contractual obligations to DGP because the undisputed evidence also shows that DGP was the sole owner of the Cabot building. According to DGP, two distinct categories of property were covered by the policy: (1) buildings owned by an insured; and (2) personal property owned by an insured. DGP further contends that while Columbus was insured for its personal property loss, *only* DGP was insured for the building loss because it was the sole owner of that building. Thus, DGP posits that the summary judgment evidence establishes that American Guarantee breached the policy by refusing to pay DGP, and only DGP, for the total value of the Cabot building loss.

DGP misconstrues the policy provisions defining "Covered Property." As our factual summary reflects, covered property included "[t]he Insured's interest in buildings (or structures)" and "[t]he Insured's interest in Personal Property." The coverage for buildings was not limited to an ownership interest, but extended broadly to "The Insured's interest in buildings (or structures) including new construction, alterations, additions, and repairs; *that the Insured owns occupies, leases or rents*." (Italics added.) Columbus was the First Named Insured under this policy and its leasehold interest in Cabot was a covered building loss under this policy provision.

DGP intimates that any interior tenant improvement loss suffered by Columbus should have been adjusted as a personal property loss rather than a building loss, because the provision describing coverage for personal property loss used the term "Improvements and Betterments." Employing that approach would not alter the fact that American Guarantee fulfilled its obligations under the policy to pay insurance benefits for the tenant improvement loss. The undisputed evidence shows that there were two distinct components of the Stellar repair estimate, the building structure which belonged

to DGP and the interior tenant improvements which belonged to Columbus, and that American Guarantee paid that total amount.

At times it appears that DGP is also pursuing an unpleaded theory that American Guarantee breached the policy by making an improper allocation of insurance benefits between DGP and Columbus. DGP cannot find any support for this theory in the policy itself which expressly stated that any covered loss under the policy would be adjusted with and payable to the First Named Insured. However, DGP has also alleged a cause of action for breach of the implied covenant of good faith and fair dealing. " '[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. . . . [E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured.' [Citations.]" (*Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1235-1236.)

Here, the complaint allegations about improper adjustment of claims filed against the policy were very general, but DGP's theory during the summary judgment proceedings was that American Guarantee failed to conduct a proper investigation as to whether DGP was entitled to recover for the interior improvement component of the building loss.

American Guarantee carried its summary judgment burden with respect to the failure to investigate claim by producing evidence of the following factual circumstances: Before DGP submitted its 2010 claim, there was no reason to investigate any issue pertaining to the allocation of the building loss between Columbus and DGP because those insured entities jointly presented and pursued their claims for that loss, using the same professional representative and the same building contractor to quantify their loss. When American Guarantee received DGP's 2010 claim, which included the interior improvement loss Columbus had already claimed, Healy attempted to resolve the potential conflict by corresponding with DGP's attorney; offering to meet with DGP and its representatives; and agreeing to consider any information DGP was willing to provide to support its claim for payment of the interior improvements loss. DGP rebuffed all of

those efforts and elected instead to resolve the matter with Columbus by executing the June 2010 Side Agreement.

An insurance company "facing multiple claims on a limited pool of funds" can protect itself "without breaching its duty to either insured" by seeking "a negotiated agreement among the insureds as to a fair apportionment of the pool of funds." (*Schwartz v. State Farm Fire & Casualty Co.* (2001) 88 Cal.App.4th 1329, 1341.) Here, American Guarantee did not have the opportunity to solicit an agreement from its insureds because DGP excluded American Guarantee from its negotiations with Columbus. Nevertheless, DGP and Columbus, who submitted duplicative claims for the same building insurance benefit, negotiated an agreement on their own resulting in an apportionment of those funds neither side contends was unfair.

On appeal, DGP mischaracterizes the June 2010 Side Agreement as a "loan." But, neither the express terms of that contract, nor any other evidence supports this characterization. DGP also contends that the only reason it executed the Side Agreement was because American Guarantee denied its 2010 claim. However, the undisputed evidence demonstrates that DGP executed the June 2010 Side Agreement *while* American Guarantee was in the process of adjusting the building loss claims, and *before* any payment was made for the interior improvement damages.

DGP contends there is a triable issue of material fact because American Guarantee ignored evidence that most of the tenant improvements were installed in the Cabot building before Columbus leased the property in 2006. DGP's evidence regarding the timing of the installation of tenant improvements does not raise a triable issue of material fact for two independent reasons.

First, DGP's evidence does not actually address the relevant question of whether the tenant improvements were owned by Columbus or DGP. For example, the declaration of DGP managing partner John Piccetti contains this statement: "In 2006, Cabot contained meat processing and refrigeration rooms, offices, bathrooms, HVAC, electrical panels, plumbing, interior partition walls, and was a fully functioning building." However, Piccetti's declarations and deposition testimony all carefully avoid the question

of whether these interior features were owned by San Francisco Sausage which, as discussed above, was reorganized into the Columbus entities. Further, Piccetti admitted that in 2007, Columbus Manufacturing made "some" modifications to an interior room in 2007. This concession adds support to our conclusion that the June 2010 Agreement was a negotiated agreement among the insureds regarding a fair allocation of the limited pool of insurance proceeds for the building loss.

A second independent problem with DGP's evidence is that neither Piccetti nor anyone else has claimed that DGP shared information with American Guarantee about the timing of the installation of the tenant improvements *during* the claims adjustment process. Indeed, as late as May 2010, DGP's attorney acknowledged in writing that DGP was withholding information from American Guarantee on this very subject. And, a month later, DGP executed the June 2010 Side Agreement pursuant to which it agreed not to submit any information to American Guarantee that would jeopardize Columbus's tenant improvement building claim in exchange for Columbus's agreement to pay DGP $2.5 million and to reinvest the insurance proceeds for the tenant improvement loss in another DGP building.[5]

Viewed as a whole, the summary judgment evidence established the absence of a triable issue of fact with respect to DGP's claim that American Guarantee failed to adequately investigate the duplicative claims for the tenant improvement component of the Cabot building loss.

C. DGP's Insurable Interest Theory

Because American Guarantee made a prima facie showing of the nonexistence of any triable issue of material fact, the burden shifted to DGP to produce evidence raising a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) DGP contends it

[5] During his deposition in this case, Adam Ferrif testified that Columbus executed the June 2010 Side Agreement because it wanted DGP to "stall" its claim until after Columbus's claim was paid. Columbus was concerned that DGP's claim would antagonize American Guarantee and slow down the adjustment process.

carried that burden—and more—by establishing that Columbus did not have an insurable interest in the Cabot property.

"No person may recover on a policy of insurance unless that person has an insurable interest in the property insured." (*California Food Service Corp. v. Great American Ins. Co.* (1982) 130 Cal.App.3d 892, 897 (*Cal. Food*).) The insurable interest "must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime . . . ." (Ins. Code, § 286.)

The term insurable interest is defined in section 281 of the Insurance Code which states: "Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest." "Simply phrased, an insurable interest exists when 'the insured has a direct pecuniary interest in the preservation of the property and . . . will suffer a pecuniary loss as an immediate and proximate result of this destruction . . . . [Citation.]' [Citation.]" (*Cal. Food, supra*, 130 Cal.App.3d at p. 897.)

According to DGP, the summary judgment evidence compels the conclusion that Columbus did not have an insurable interest in the Cabot property and, therefore, "Zurich's payment of the $11.9 million [tenant improvement claim] to Columbus not only failed to fulfill its independent contractual obligation to DGP, it violated long-standing California law."

As a preliminary matter we conclude that DGP does not have standing to question whether Columbus had an insurable interest in the Cabot building. Under California law, "the insurer is the only party who can raise the question of insurable interest." (*Jenkins v. Hill* (1939) 35 Cal.App.2d 521, 524 [administrator of decedent's estate lacked standing to question whether decedent's beneficiary had insurable interest]; see also *In re Marriage of Bratton* (1994) 28 Cal.App.4th 791 [plaintiff lacked standing to challenge legality or enforceability of policy of insurance former spouse held on plaintiff's life]; *Countrywide Home Loans, Inc. v. Tutungi* (1998) 66 Cal.App.4th 727 [former condominium owners could not contest the insurability of homeowner association's interest in property];

2 Witkin, Summary of Cal. Law (10th ed. 2005) Insurance, § 75, p. 119 ["The insurer is the only party that can raise the question of lack of insurable interest."].)

DGP contends the authority cited above does not apply in this case because DGP is in "contractual privity" with American Guarantee. DGP fails to explain why this fact is determinative. Any independent contractual obligation that American Guarantee owed to DGP existed whether or not American Guarantee's payment of Columbus's claim violated the insurable interest rule. Thus, the question whether Columbus had an insurable interest in Cabot is a collateral inquiry which cannot create a triable issue of material fact with respect to DGP's claim that American Guarantee violated an independent contractual obligation to DGP.

Even if DGP has standing to raise this issue, the summary judgment evidence establishes that Columbus did have an insurable interest in the Cabot property when the policy went into effect in January 2009, and when the fire occurred in July of that same year. Throughout that period, Columbus had a possessory leasehold interest in the Cabot building which was used as a manufacturing plant for its specialty meat business. It also had a contractual obligation under the lease to maintain and protect the building by, among other things, securing insurance. Thus, Columbus had a direct pecuniary interest in the preservation of the Cabot building which met the statutory definition of an insurable interest. (Ins. Code, §§ 281, 286; see also *Cal. Food*, *supra*, 130 Cal.App.3d at p. 897.)

DGP contends that whatever interest Columbus may have had in conducting its business at the Cabot building was not an insurable interest as a matter of law because, as the sole owner of the Cabot building, DGP was the only party with an insurable interest in that building.

There is no dispute that DGP's ownership of the Cabot building was an insurable interest. But this undisputed fact did not preclude Columbus from acquiring an insurable interest in the Cabot building for two related reasons. First, ownership is not a prerequisite for obtaining an insurable interest, either under the statutory definition quoted above or under the case law. (See, e.g., *Shade Foods, Inc. v. Innovative Products*

Sales & Marketing, Inc. (2000) 78 Cal.App.4th 847, 874-875 [almond processing company had an insurable interest in almonds owned by another].) Second, there can be more than one insurable interest in the same property. (*Ibid*.; *Alexander v. Security-First Nat. Bank* (1936) 7 Cal.2d 718, 723 [lessor and lessee may have separate insurable interests in same property]; *Long v. Keller* (1980) 104 Cal.App.3d 312, 316 [lessor and lessee had separate and distinct insurable interest in improvements on leased property regardless of who made them].)

DGP's efforts to avoid these settled principals are not availing. Anticipating we would reach this conclusion, DGP argues that to the extent the 2006 lease gave rise to a separate insurable interest in the Cabot building: (1) that interest belonged to Columbus Manufacturing rather than to Columbus Foods; and (2) American Guarantee cannot use Columbus Manufacturing's interest in the building to justify its payment of insurance benefits to Columbus Foods.

We reject these assertions. First, as we noted earlier, Columbus Manufacturing was a named insured under the policy. The First Named Insured was Columbus Foods and all of its subsidiaries, which included Columbus Manufacturing. In addition, Columbus Manufacturing was also the second named insured listed on the named insured endorsement. Throughout the claims process, Columbus Foods represented itself and Columbus Manufacturing. For example, its proof of loss forms were executed by Adam Ferrif on behalf of both "Columbus Foods LLC and Columbus Manufacturing Inc." Thus, the summary judgment evidence establishes that American Guarantee paid insurance benefits for the tenant improvement loss to a named insured with an insurable interest in the Cabot building.

A second independent problem with DGP's argument is that Columbus Foods also had an insurable interest in Cabot. As the holding company and sole owner of Columbus Manufacturing, Columbus Foods had a financial interest in its manufacturing operations. Undisputed evidence shows that those operations were conducted at the Cabot building. This direct pecuniary interest in, and relationship to, the Cabot property was of "such a

nature that a contemplated peril might directly damnify" not just Columbus Manufacturing, but Columbus Foods as well. (Ins. Code, § 281.)

DGP contends that the only evidence that Columbus Foods had any pecuniary interest in the Cabot building was contained in a declaration from Adam Ferrif, which should have been excluded from the record. Ferrif, the chief financial officer of Columbus Foods, stated that he had personal knowledge of the following facts: At the time of the fire, Columbus Foods was the holding company for and sole owner/shareholder of Columbus Manufacturing and Columbus Distributing. Aside from cash, these two subsidiaries were Columbus Foods' sole assets. Columbus Foods derived all of its income from the specialty meat business conducted through Columbus Manufacturing and Columbus Distributing. The three Columbus entities prepared a single consolidated financial statement which was audited annually. During the period that the Cabot property was leased to Columbus Manufacturing the building was used to process meat products that were sold and distributed by the Columbus subsidiaries. Columbus Foods derived income from the sale of those products.

In its "Appellant's Opening Brief," DGP argues that the "Ferrif declaration contained no admissible evidence." This general objection unaccompanied by cognizable legal argument or proper citation to authority does not constitute a valid claim of error. (*Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 956.) The only specific evidentiary objection that DGP makes is that Ferrif's "testimony about the content of financial statements never offered in[to] evidence" constitutes inadmissible hearsay. (Citing Evid. Code, § 1523, subd. (a).)[6] However Ferrif's testimony was not hearsay (or in violation of the secondary evidence rule) on this ground because it was not offered to prove the content of any financial document, but rather to explain the manner

[6] "In 1998, the Legislature repealed the best evidence rule and enacted the Secondary Evidence Rule ([Evid. Code,] §§ 1520–1523). (Stats.1998, ch. 100, §§ 1, 2, p. 633.) Under the Secondary Evidence Rule, '[t]he content of a writing may be proved by *otherwise admissible* secondary evidence.' (§ 1521, subd. (a), italics added.)" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187.)

in which the Columbus entities operated their specialty meat business and the role that the Cabot building played in that operation. (See, e.g., *Crail v. Blakely* (1973) 8 Cal.3d 744, 754-755.)

DGP argues that even if the Ferrif declaration was admissible, it is irrelevant because evidence that Columbus Foods and Columbus Manufacturing are "financially joined" does not establish "an insurable ownership interest in DGP's building." However, as we have already explained, ownership is not a prerequisite for having an insurable interest in property.

Cal. Food, *supra*, 130 Cal.App.3d 892, is instructive. The primary issue in that case was which of two insurers was liable for damages caused by a fire at a leased restaurant. The building was leased to Sandy's, who obtained fire insurance from Highlands. Sandy's then executed a letter of intent to sell its assets including its leasehold interest to CFS. CFS obtained insurance from Great American and began operating its restaurant. However, "most of the conditions" to effectuate a transfer of the lease from Sandy's to CFS had not been met when the fire occurred. (*Id*. at pp. 895-896.) The trial court found that Great American was not liable for the fire damage because CFS did not have an insurable leasehold interest in the restaurant building at the time of the fire. Reversing the judgment on appeal, the *Cal. Food* court found that CFS's letter of intent was equivalent to a binding contract to assume Sandy's obligations under the lease, which included the obligation to obtain fire insurance, and "given the existence of a binding contract, CFS had an insurable interest in the restaurant building which was protected by the fire insurance policy issued by Great American." (*Id*. at p. 897, fn. omitted.) The court then applied the equitable contribution doctrine to find that both insurances companies bore responsibility for one half of the stipulated loss. (*Id*. at pp. 901-902.)

Cal. Food illustrates that an entity does not have to own property to have an insurable interest. Indeed, neither Sandy's nor CFS owned the building they used to operate their respective restaurants, and yet both had an insurable interest in that building. *Cal. Food* also confirms that more than one entity can share an insurable interest in a

leased building. Just as the binding letter of intent gave CFS an insurable interest by virtue of Sandy's lease, Columbus Food's sole ownership of Columbus Manufacturing gave both Columbus entities an insurable interest in the Cabot building.

DGP contends that *Cal. Foods* is inapposite because Columbus Foods was neither a tenant nor a subtenant in possession of the Cabot building, but only a shareholder of a tenant. This distinction matters, DGP argues, because a corporate parent does not own or hold legal title to the assets of its subsidiary. (Citing *Dole Food Co. v. Patrickson* (2003) 538 U.S. 468, 474 (*Dole*).) Once again, ownership is not an essential element of an insurable interest. Furthermore, *Dole*, *supra*, is inapposite. In that case, the Supreme Court held that a foreign state must own a majority of a corporation's shares in order for the corporation to qualify as an instrumentality of the state under the Foreign Sovereign Immunities Act of 1976. (*Dole*, at pp. 475-476.) In reaching this conclusion, the *Dole* court did not address the insurable interest rule or any aspect of California law.

" 'California law does not require that insureds themselves own traditional forms of property interests to create an insurable interest in property.' [Citation.]" (*McAdam v. State Nat. Ins. Co.* (S.D. Cal. 2014) 28 F.Supp.3d 1110, 1117 (*McAdam*).) Instead, Insurance Code section 281 contains a broad definition of an insurable interest which encompasses "[e]very interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured." Thus, for example, the *McAdam* court found that under California law a majority shareholder and manager of a company could establish that he held an insurable interest in the company's assets. (*McAdam*, at p. 1117.)

In summary, DGP's theory that Columbus did not have an insurable interest in the Cabot building is based on erroneous legal principals and flawed logic. Thus, even if DGP had standing to raise the insurable interest issue, it does not meet its burden of showing a triable issue of material fact existed regarding its claim that American Guarantee breached the policy by denying the part of DGP's 2010 claim that requested a duplicative recovery for the interior tenant improvement loss.

D. DGP's Other Breach of Contract Theories

DGP contends that American Guarantee breached the policy by failing to pay two other claims that DGP made against the policy. Although these theories were not alleged in the complaint, they were addressed at summary judgment.

First, DGP contends that American Guarantee refused to pay the cost of demolishing and removing the Cabot building structure. According to DGP managing partner John Piccetti, "DGP paid $233,950 for the demolition of the burnt Cabot building in 2011 and made a claim for that amount under our insurance policy. We paid to remove walls, the entire roof and remove the debris from the site. Zurich denied our claim and to date we have not been paid for that claim."

American Guarantee produced evidence that demolition and removal costs were built into the Stellar cost repair estimate. Furthermore, there is no dispute that DGP and Columbus both used the Stellar estimate to support their respective building loss claims and that American Guarantee adjusted and paid the claims in accordance with that repair estimate. With these facts, the burden of production shifted to DGP to produce evidence that American Guarantee breached some obligation under the policy by failing to pay an additional sum for demolition and debris removal. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) DGP did not carry that burden.

DGP's second objection pertains to American Guarantee's denial of a request for reimbursement of a $93,940 payment that DGP paid Dempsey to assist with the presentation of its claims. The summary judgment evidence establishes the following pertinent facts: The policy provided coverage for professional fees in the amount of $100,000 per occurrence. Dempsey was jointly retained by American Guarantee and Columbus to assist with the presentation of their insurance claims. In 2010, American Guarantee paid Columbus $100,000 for Dempsey's fees. In April 2011, DGP requested an additional payment under the policy for fees that DGP previously paid to Dempsey. In June 2011, American Guarantee denied that request because the policy limit for professional fee coverage had already been exhausted.

DGP contends that American Guarantee acted in bad faith by making a unilateral decision to pay Columbus the entire $100,000 of professional services coverage. According to DGP, American Guarantee should have either sought a negotiated agreement from the insureds or filed an interpleader action to settle the dispute between DGP and Columbus about who should recover for this part of the loss. (Citing *Schwartz v. State Farm Fire and Cas. Co.*, *supra*, 88 Cal.App.4th at p. 1341.)

There is no evidence of any dispute among the insureds with respect to the insurance benefit for professional services fees. The facts summarized above demonstrate that Dempsey was jointly retained by Columbus and DGP; American Guarantee paid Columbus for Dempsey's fees *before* DGP requested an additional payment to cover Dempsey's fees; and DGP's request was made *after* the professional fee benefit was exhausted. Thus, there is no triable issue of material fact precluding summary judgment with respect to the denial of DGP's 2011 request for an additional payment of Dempsey's fees.

IV.
DISPOSITION

The judgment is affirmed. American Guarantee and Zurich are awarded costs on appeal.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

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STREETER, J.